IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-634

UNITED STATES CIVIL SERVICE COMMISSION, ET AL., Appellants

v.

NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO, ET AL.

On Appeal From the United States District Court for the District of Columbia

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MOTION TO AFFIRM

Pursuant to Rule 16(1)(c) of the Revised Rules of this Court, appellees move that the judgment of the district court be affirmed.

1. We agree with the Government that the issue presented is manifestly important (J.S. 9). It does not follow that it is, therefore, substantial.

In this case, as in other appeals from federal courts, Rules 15(1)(f) and 16(1)(c) apply. Under these provisions, the burden is on appellants to show that "the questions presented are so substantial as to require plenary consideration, with briefs on the merits and

oral argument, for their resolution" (Rule 15(1)(f)). That burden manifestly has not been met by the Government's one-paragraph discussion of the merits in the Jurisdictional Statement (J.S. 9-10).

We readily concede that it is a rare case where a three-judge district court's invalidation of an Act of Congress is so clearly correct as not to present a substantial question. This, we submit, is such a case. Whatever the state of constitutional law three decades ago when the Hatch Act[1] was enacted, or a quarter of a century ago when its constitutionality was last before this Court on the merits,[2] the First Amendment principles followed by the district court here are now so well established,[3] and their applicability to the Hatch Act so patent, as to require no elaboration.

2. The Government indulges in hyperbole in characterizing the decision below as "removing all restraints on partisan political activity by federal employees" (J.S. 7). If that were the holding of the district court, plenary consideration here would surely be merited. But the district court held no more than that, when the Congress directly restricts free political speech and association, (a) it must do so in comprehensible language with reasonably ascertainable standards, and (b) it may impose only such restrictions as are necessary to protect identifiable and overriding

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[1] 5 U.S.C. § 7324 (a) (2).

[2] United Public Workers v. Mitchell, 330 U.S. 75; Oklahoma v. Civil Service Commission, 330 U.S. 127.

[3] See, *e.g.*, Grayned v. City of Rockford, 408 U.S. 104, 108, 114-15; Police Department of Chicago v. Mosley, 408 U.S. 92, 101; Gooding v. Wilson, 405 U.S. 518, 521; Dunn v. Blumstein, 405 U.S. 330, 342-43; Papachristou v. City of Jacksonville, 405 U.S. 156, 162.

governmental interests. Carefully left intact were numerous statutory protections against pernicious political activity by governmental employees, such as coercion of subordinates, and the like.[4] The only restraints struck down were those which broadly prohibit voluntary partisan activity, and which the district court found to be so obscurely defined that "no one can read the Act and ascertain what it prohibits" (J.S. 7a).

The district court expressly recognized, moreover, that "there is an obvious, well-established governmental interest in restricting political activities by federal employees" (J.S. 2a). It explicitly left wide latitude for the Congress to protect that interest by "carefully and narrowly drawn" legislation consistent with the First Amendment (J.S. 11a).

The constitutional standard applied to the Hatch Act by the district court was meticulously expressed, and conforms precisely to this Court's decisions on vagueness and overbreadth under the First Amendment (J.S. 11a-12a):[5]

> "Some activities involving speech and association may be regulated where a proper governmental purpose and definite need is demonstrated. The interference with privileged conduct must be care-

[4] *E.g.*, 5 U.S.C. § 7321 (authorizing rules to protect government employees from coerced political contributions or service); 5 U.S.C. § 7324(a)(1) (prohibiting federal employees from using official authority or influence to interfere with or affect an election); 18 U.S.C. ch. 29 (providing criminal penalties for various forms of political coercion or intimidation of or by government employees).

[5] *E.g.*, Grayned v. City of Rockford, note 3, *supra;* United States v. Robel, 389 U.S. 258; Keyishian v. Board of Regents, 385 U.S. 589.

> fully and narrowly drawn. Executive agency employees as citizens are entitled to be specifically informed as to what the Congress intends to forbid. [Footnote omitted.] Restrictions may not be achieved by means which sweep unnecessarily broadly into the First Amendment areas. [Footnote omitted.] This right and privilege of expression and association cannot be so unnecessarily invaded that the use is dampened and discouraged. To chill is to despirit, and the First Amendment will not flourish but can be gradually suffocated in such an atmosphere."

Applying this standard, the court below fully canvassed the structure and operation of the Hatch Act, with its blanket incorporation by reference of several thousand obscure, confusing, and excessive pre-1940 administrative rulings, as well as the Government's attempted justification of the Act.[6] Further deliberation should be unnecessary to affirm the clearly compelled and long overdue invalidation of the Hatch Act on the grounds stated by the district court.

3. Nor is plenary review warranted by *United Public Workers* v. *Mitchell*, 330 U.S. 75, or *Oklahoma* v. *Civil Service Commission*, 330 U.S. 127. Even prior

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[6] The district court expressly considered and properly rejected the Government's argument that clarifying and narrowing administrative regulations and advisory rulings could save the statute (J.S. 9a-10a). Quite apart from the fact (see J.S. 6a) that Congress expressly refrained from giving the Civil Service Commission "any more power to interpret further in the future" (86 CONG. REC. 2949 (1940) (Remarks of Senator Hatch)), it is settled that "well-intentioned prosecutors and judicial safeguards do not neutralize the vice of a vague [and overbroad] law" (Baggett v. Bullitt, 377 U.S. 360, 373).

to the decision below, courts[7] and commentators[8] alike had recognized that this Court, in its development of First Amendment jurisprudence, long ago repudiated each of the two premises on which those cases rest. The 4-3 *Mitchell* decision, which (as appellants concede, J.S. 9) failed even to discuss the vagueness and overbreadth arguments relied upon here, was bottomed on the two propositions: (a) that public employment is a privilege to which no constitutional rights attach, and (b) that First Amendment impairments may be judged by the "rational nexus" test applicable to economic regulation—"it is not necessary that the act regulated be anything more than an act reasonably deemed by Congress to interfere with the efficiency of the public service" (330 U.S. at 101). The decision below properly left these misconceptions in the desuetude to which this Court has consigned them. *Cf. Angel* v. *Bullington,* 330 U.S. 183, 192.

4. Granting this motion for summary affirmance will assure that the Congress will proceed immediately to consider whether and how the public interest requires properly circumscribed restrictions on voluntary partisan political activity by government employees. The plenary review sought by the Government, in contrast,

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[7] *E.g.,* Hobbs v. Thompson, 448 F.2d 456 (5th Cir.); Mancuso v. Taft, 341 F.Supp. 574 (D.R.I.), *appeal docketed,* No. 72-1180, 1st Cir., May 23, 1972; Fort v. Civil Service Commission, 61 Cal.2d 331, 392 P.2d 385, 38 Cal.Reptr. 625 (1964); Minielly v. State, 242 Ore. 490, 441 P.2d 69 (1966); Huerta v. Flood, 103 Ariz. 608, 447 P.2d 866 (1968); DeStefano v. Wilson, 96 N.J. Super. 592, 233 A.2d 682 (Super.Ct. 1967).

[8] *E.g.,* EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 582-92 (1971 ed.) ("Plainly the approach of the Court in the *United Public Workers* case is outdated and must be abandoned." *Id.,* at 590); Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law,* 81 HARV.L.REV. 1439 (1968).

would involve the Court in the dubious enterprise of straining to rewrite a complex and confusing statutory scheme that in no event could pass constitutional muster in its present form.[9] Any such judicial process of patchwork reconstruction could result only in a statute never contemplated, considered or enacted by the legislative branch. But, "the task of writing legislation which will stay within [constitutional] bounds has been committed to Congress." *United States* v. *Robel,* 389 U.S. 258, 267.

CONCLUSION

No substantial constitutional question is presented. The motion to affirm should be granted.

Respectfully submitted,

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[9] Even the dissent below found it necessary to disregard the plain terms of Section 15 in order to rescue it from First Amendment condemnation (J.S. 30a-33a). As the majority observed, however, "In the delicate, precious area of free speech, the obligation of the courts to seek all possible, even if somewhat tortured, means to uphold admittedly fuzzy congressional action must give way to other considerations" (J.S. 13a).